In Nor Light the Commission relied on NARUC I[33] for the proposition that common carriage is the holding out "indiscriminately to the clientele [it] is suited to serve." Whether there is such a holding out depends upon: 1) whether the carrier's practice is to make an individualized decision in each service offering; 2) the duration of the service contracts; and 3) the extent to which contracts are tailored to the needs of particular customers. In NorLight, the Commission found the offering to be private based on: 1) the Company's plan to negotiate with, and select customers on an individualized basis; 2) the absence of any plan to establish set prices or terms of service; 3) the anticipated lease terms of between five and ten years; and 4) the Company's primary objective would be to meet the internal needs of the parent utilities. [34]

In the more recent Atlantic Express case, (decided under the Cable Landing License Act, not the 1996 Act,) the Commission again stated its policy to authorize non-common carrier cables where there were no reasons to expect a general and indifferent "holding out" to the eligible user public.[35]

Under Nor Light and Atlantic Express, the distinction then, is not whether the Company is a wholesale or retail provider, but whether its decisions to do business are (or are required to be) a holding out to its eligible customers on a nondiscriminatory basis. As noted above, the State's basic justification for the Exclusive Freeway Use Provision is that the Company is

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[33] 2 FCC Rcd. at 134; NARUC vs FCC, 525 F. 2d 630, 641-642 (D.C. Cir. 1976), cert. denied, 425 US 992 (1976)`.

[34]The Commission noted that NorLight needed to screen each customer carefully to make sure it complied with system requirements before allowing it to use the network in order to ensure availability of the parent utilities' share. Id. at 134 The State can not simultaneously claim that the contractor is able to discriminate (so that the service is not a telecommunications service under the Nor Light standards) and claim that competitors will be provided access on a fair and nondiscriminatory basis. Further, the State itself plans to use a portion of its capacity reserved on its exclusive facilities provider to compete for the business of both other state agencies, private educational institutions and public corporations.

[35] 11 FCC Rec. at 7036

required to make a non-discriminatory offer to all eligible customers (who are defined as "telecommunications service providers"). These service providers are expected, in turn, to provide service to the public. Accordingly, it is clear that the services to be offered by the Company are "telecommunications services" and are within the scope of Section 253(a).

2. Section 253(a) applies both to individual entities and markets.

The State characterizes the appropriate focus for the Commission's review as "the wholesale fiber transport market throughout all of Minnesota." (St. Pet. p. 20). This argument should be rejected by the Commission because it is inconsistent with the intent of Section 253(a) which applies to both individual entities and individual services. The State's approach would gloss over competitive barriers that will result for a number of individual entities and markets for services within specific locations in Minnesota, contrary to the intent of Section 253(a).

a) Section 253(a) bars legal requirements that have the effect of prohibiting the ability of any individual entity to provide any service.

The phrasing of Section 253(a) shows that it is intended to prevent barriers that may impede individual entities attempting to provide individual service, and is not intended to be limited to the general market overview that the State urges. Section 253(a) provides:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of <u>any entity</u> to provide <u>any</u> interstate or intrastate <u>telecommunications service</u>.

(Emphasis added.) The Commission has recognized that Section 253(a) is intended to prevent impediments to specific markets and is not limited to protection of only large markets or competition in general. As the Commission noted:

> As explained in the <u>Local Competition First Report and Order</u>, under the 1996 Act, the opening of the local exchange and exchange access markets to

> competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets."

(Emphasis in original.) Classic. ¶ 25. The approach reflected in the Local Competition First Report and Order and in Classic is directly opposed to the limited and superficial overview urged by the State. Section 253(a) is intended to operate in specific situations for the benefit of specific competitors.[36]

b) Section 253(a) bars legal requirements that inhibit individual markets for individual services.

The approach taken by the Commission in Huntington Park demonstrates the manner in which Section 253(a) applies to prevent competitive barriers for specific services in specific locations. The Commission did not limit its inquiry to the impact of the Ordinance on the payphone market in general, but rather focused on the portion of the payphone market that was restricted by the Ordinance, saying in part:

> The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to actually prohibit or effectively prohibit the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District.

(Emphasis added.) 12 FCC Rcd. 14209 at ¶ 38. If the Commission had accepted the approach urged by the State, the Commission would have considered the impact of the Ordinance on the payphone market throughout Huntington Park or perhaps throughout southern California. Instead, the Commission properly focused on the area directly affected by the Ordinance. The

[36] The 1996 Act is clearly intended to protect individual entities in individual markets, unlike the Sherman or Clayton Acts, which protect "competition, not competitors." See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 488, 489 (citing Brown Shoe Co. v. United States, 320 U.S. at 320).

same approach should be followed in this case, and the Commission should consider the impact on all communities located along the freeway rights-of way in Minnesota, both large and small.

c) The statewide review proposed by the State is inconsistent with the way that telecommunications networks function.

The manner in which the telecommunications network functions is also demonstrates the flaw of using a vague statewide review, and that such an approach will obscure the impact of the Exclusive Freeway Use Provision on many specific services in many specific locations. As a result of the way that the telecommunications network operates, transport facilities available in one area, community, or route in Minnesota do not provide a suitable substitute for transport needed in a different location, community, or route.

The Company's advantages are particularly apparent and will be particularly difficult to overcome for any entity that decides (at some point in the future) to provide high capacity services to other telecommunications service providers between communities along the freeways. These services would include service between Minneapolis/ St. Paul and Duluth and between Minneapolis/ St. Paul and Fargo/ Moorhead and to other smaller communities along those freeways. See, Section D.4 below.

Commission must consider the impact on individual entities and individual markets. The over generalized and superficial approach recommended by the State will hide competitive barriers that will inhibit many entities and many services.

3. The application of Section 253(a) does not change based on whether the use of freeway rights-of way is old or new.

The State argues that this case is distinguishable from Huntington Park and Troy (and presumably from Section 253(a)) because the freeway right-of way has not been previously used.

(St. Pet. p. 19.) This distinction is of no legal consequence and should be rejected. In addition, it is factually incorrect, since freeway use has already occurred in Minnesota.

As the State acknowledges in both the Agreement and Petition, the 50 mile stretch of freeway right-of way between the Minneapolis/St. Paul area and St. Cloud has been used for fiber optic facility installation by AT&T.[37] Thus, this restriction imposed by the State does apply, at least in part, to previously used freeway right-of way

More significantly, the distinction urged by the State is without support in the plain language of Section 253(a), logic, or prior decisions of the Commission. Review of Section 253(a) shows no hint of a distinction between prohibitions or discrimination applied to new or old rights-of way.

Further, there is no logic behind such a distinction. Under the State's approach, a State could impose more prohibitions and more discrimination on a new street, road or highway than on an old. Clearly, the 1996 Act does not intend such an anomalous result.

Finally, there is no support within the cases decided by the Commission. Neither <u>Huntington Park</u> nor <u>Troy</u> indicate that a different result would be reached if new right-of way was involved. For these reasons, the State's argument that a lesser level of scrutiny be applied to the freeway rights-of way should be rejected.

D. The Exclusive Use Provision s Will Have The Effect Of Prohibiting The Ability Of Other Entities To Provide Telecommunications Services.

Section 253(a) bars both explicit prohibitions on competition for specific services <u>and</u> prohibitions that have the effect of inhibiting competition for specific services. The State cites

[37] See, Agreement, § 1.8; State Petition Footnote 7(Contrary to the inference of Footnote 7, the permit extended from Plymouth for approximately 5 miles along I 494 to the intersection with I 94 and then north approximately 50 miles along I 94 to St Cloud in Stearns County)

New England and Classic as examples of the type of restriction forbidden by Section 253(a). (St. Pet. pp. 17-18.) However, the express prohibitions preempted in New England and Classic do not limit the application of Section 253(a) to other legal requirements that have the "effect of prohibiting" other entities' ability to provide service. The State also tries to distinguish Classic on the basis of its fallacious service/facility distinction (St. Pet. p. 17.) but fails to note that the issue in Classic was whether the cities could franchise only one facilities-based telephone company. In Classic, the company intended to offer service using its own facilities, and not through the resale of those of the other.

The State also argues that its actions are outside the scope of Section 253(a) because it has not used its authority "with the purpose of conditioning or restricting competition." (St. Pet. p. 19.) However, the State's intentions do not control application of Section 253(a). Rather, application of Section 253(a) depends on the effect on the ability of entities to compete. The facts and prior decisions of the Commission demonstrate that the Exclusive Freeway Use Provision violates Section 253(a).

1. A legal requirement that will restrict an entity's ability to choose between use of its own facilities or purchase from others violates Section 253(a).

The Commission has held that restricting an entity's choice of which facilities to use to provide competing telecommunications services has the "effect of prohibiting" the ability of that entity to provide those services. In PUC of Texas, the Commission said in part:

> [W]e find that Section 253(a) bars state and local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.

Id., at ¶ 74. The Commission further held that:

> [S]ection 253(a) of the 1996 Act bars state or local governments from restricting the means by which a new entrant chooses to provide telecommunications services. Specifically, we determined that the 1996 Act requires that new entrants be permitted to offer services via resale, incumbent LEC unbundled network elements, the new entrant's own facilities, or any combination thereof.

Id. at ¶ 128. While PUC of Texas involved a legal requirement compelling installation of facilities, clearly Section 253(a) also bars a legal requirement forbidding installation that unequally restricts the ability of an entity to use its own facilities. In this case, that prohibition will impede use of an entities own facilities to provide telecommunications service between and within communities located along freeway rights-of way in Minnesota.

2. A legal requirement that materially increases the costs of some entities, but not others, violates Section 253(a).

Legal requirements that impose added costs or investment requirements on some competitors, but not others, are barred by Section 253(a). In New England , the Commission said in part:

> We find that requiring payphone providers to provide local exchange services in order to be eligible to offer payphone services significantly hinders such providers relative to incumbent LECs and certified LECs. Such a requirement substantially raises the costs and other burdens of providing payphone services, thus deterring the entry of potential competitors.

Id. at ¶ 20. The Commission has very recently confirmed that imposing added investment requirements can have the effect of prohibiting competitors, saying in part:

> We preempt enforcement of these requirements . . ., independently, because they impose a financial burden that has the effect of prohibiting certain entities from providing telecommunications services in violation of section 253.

PUC of Texas ¶ 13. The Commission continued:

> [W]e further find, as an independent basis for preemption under section 253, that enforcement of the build-out requirements would "have the effect of prohibiting" AT&T, MCI and Sprint from providing service contrary to section 253(a) due to

> the substantial financial investment involved and the comparatively high cost per loop sold by a new entrant.

Id. at ¶ 78. Clearly, the Exclusive Freeway Use Provision provisions of the Agreement are not saved by the fact that other providers can use higher cost routes than the freeway routes that the State has made available to the Company.

3. The 10 to 20 year duration of the Exclusive Freeway Use Provision is sufficient to violate Section 253(a) and requires consideration of possible impacts throughout the 10 to 20 year period .

The State has granted to the Company Exclusive Freeway Use Provision for a 10 year period following completion of construction (scheduled over 3 years) plus the right to first negotiation of any fiber installation in the following 10 years. In combination, the Company has the opportunity to maintain Exclusive Freeway Use Provision of the freeway rights-of way for 20 years following completion of installation. Competitive restrictions of that duration remove any doubt as to whether the restriction is prohibited by Subsection 253(a). In Silver Star, the Commission stated:

> "Section 253(a) . . . does not exempt from its reach State created barriers to entry that are scheduled to expire several years in the future. In any event, a "temporary" ban on competition that lasts for a minimum of nine years and a maximum of twelve years from the date of enactment of the 1996 Act is, for all practical purposes, an absolute prohibition.

Silver Star, 12 FCC Rcd. at 15657 ¶ 39. The proposed duration of the Exclusive Freeway Use Provision provisions of the Agreement is barred by Section 253(a).

The request for a Declaratory Ruling upholding the 10 to 20 year duration of the Exclusive Freeway Use Provision requires analysis of the impact both now and during the next 20 years. The State argues that the existence of other fiber optic facilities and the possible expansion of those facilities prevent a violation of Section 253(a). (St. Pet. pp. 22-23.) The fact that there is existing capacity in the marketplace is, first of all, irrelevant. However, even if current capacity was adequate and could be expanded significantly, there is no basis to conclude that such existing capacity will provide suitable alternatives for needs that may arise in the years 2005, 2008 or 2015, all of which are within either the express term or possible extension (by right of first negotiation)[38] of the Exclusive Freeway Use Provision. Since the request for Declaratory Ruling requests the Commission's approval for the full duration of the Exclusive Freeway Use Provision, the Commission would be required to make a finding that there would be no adverse competitive impacts throughout that 10 to 20 year period.

4. The Exclusive Freeway Use Provision will restrict the ability of many entities to use their own facilities and will materially increase their costs.

The Exclusive Freeway Use Provision will restrict the ability of every entity that wants to use its own facilities to serve other carriers and end user customers located in communities that are along (and beyond) the freeway corridors. Since the freeways are routed on the most direct routes between major population centers in Minnesota (and in most other states), the Company will have a significant cost advantage over other entities, both now and over the 10 to 20 year duration of the Exclusive Freeway Use Provision. Entities that will be put at a competitive disadvantage include:

1) entities that wish to compete in providing <u>high capacity transport services</u> to interexchange carriers with Points of Presence ("POPs") located in communities along the freeways in Minnesota;

[38] See, Agreement, Section 11.1 (e).

2) entities that wish to provide services within multiple communities located along the freeways in Minnesota using single concentrated switching or other facilities to serve multiple locations;

3) entities that wish to provide services between communities located along the freeways in Minnesota; and

4) entities that wish to provide services between points in other states over facilities that traverse Minnesota.

Entities may wish to use their own facilities for the additional control of installation and ongoing maintenance to obtain better control of quality and reliability. Those entities will be required to incur the disadvantages and added costs of indirect routing using alternative routes.

The disadvantages and added costs of alternative routing will be severe, contrary to the assurances provided by the State. Those disadvantages include both added costs of installation and added costs of maintenance, including the following:

1) higher installation costs for alternatives resulting from:

a) higher installation costs per route mile for use of alternative routes, including both somewhat higher costs in unpopulated areas and significantly higher costs in urban areas; and

b) additional route miles resulting from the fact that freeways provide more direct routes between the population centers located along the freeways than do other highways or other alternative private routes; plus

2) higher transaction costs of using alternatives resulting from the need to deal with multiple parties instead of a single entity to establish the right to use the route; plus

3) higher ongoing maintenance expenses resulting from more relocations and the less secure locations available along other highways and other alternative private routes.

These sources of higher costs are significant and well recognized elements in establishing the high market value of freeway rights of way. The April 1996 FHWA Guideline sets forth possible values for roadway rights of way of various types and installation costs for such alternatives based on 1988 date.[39]

"Transaction costs" would add to the cost advantages of the freeways and are significant. As the 1996 FHWA Guideline states in comparing the value of right-of-way to private land:

> It is misleading, however, simply to equate the real estate cost of easements on adjacent land with highway right-of-way value since this ignores cost differentials in installing telecommunications infrastructure in alternative locations. Using adjacent real estate values directly also overlooks the degree of uninterrupted access afforded by public right-of-way as well as the very real financial and administrative advantages of dealing with one agent rather than a number of individual landowners. ...
>
> The premium paid for the advantages of right-of-way already under a single "landlord" may be significantly greater than 20 per cent in some cases. ...

Exhibit 2 at § 4.1.2. Use of the freeway right-of-way allows an entity to secure access to right-of-way from a single agency. Use of trunk highway rights-of-way requires consent from both MnDOT and numerous municipalities through which trunk highways run. Use of municipal rights-of-way is a very contentious issue in Minnesota (currently subject to a rulemaking and ongoing legislative supervision), which adds to both the risk and cost of use of trunk highways rights-of-way.[40]

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[39] See, Exhibit 2 attached, 1996 FHWA Guideline, § 4.1.3.

[40] See, Laws, 1997, Chpt.123; USWest Communications, Inc. v. City of Redwood Falls and League of Minnesota Cities, 558 N.W.2d 512 (Mn App 1997). review denied (1997).

Other factors also support the greater value of interstate rights of way. The 1996 FHWA Guideline further states in part:

> In addition to the directly quantified out-of-pocket savings, valuation should take into account other less easily monetized factors that differentiate types of right-of-way; for example, probability and cost of accidental damage to telecommunications infrastructure from derailment, flooding and other construction; differences in ease of access for repair and maintenance; likelihood of expansion that would require relocation of telecommunications infrastructure.

Id. At § 4.1.2. These costs will be significant over time.

This information from the 1996 FHWA Guideline is consistent with current engineering experience.[41] Entities using trunk highway rights-of-way will experience greater installation costs than entities using freeway rights-of-way. The greater costs result from both higher cost per route mile and from greater route miles required. The cost of installation per route mile using other highway locations is higher because of additional obstacles encountered in both rural areas and in towns. Added route miles also increase costs of installation. The combination of these factors is apparent in comparing the installation costs along two freeway routes in Minnesota.[42]

The route miles needed to use trunk highways were 7.6% more than the freeway route miles for the Minneapolis/Fargo-Moorhead route, and 14.8% more for the Minneapolis/Duluth route.[43] For the Minneapolis/Fargo-Moorhead route, the installation cost to use trunk highways was estimated to exceed the cost to use the freeway by $777,669 or 59%[44] (before municipal permits or other costs). For the Minneapolis/Duluth route, the installation cost to use the trunk

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[41] See, Exhibit 4 attached, Affidavit of Kenneth Knuth.
[42] Id. at ¶¶ 3-11.

[43] Id. at ¶ 11.

[44] Id. at attached table.

highways was estimated to be exceed the cost to use the freeway by $525,393 or 70%.[45] The relative differences between freeway route and indirect trunk highway routes will be even greater for communities that are closer together along the freeways.

The cost to obtain the right to use railroad right of way is estimated at $8,000 per mile plus added installation costs, even if the railroad provides routing as direct as a freeway. [46] Clearly, none of these alternatives are comparable to the freeway for installation of fiber optic facilities.

The 1996 Act does not intend that individual entities or individual communities be placed in such an unfair and uneven competitive environment. Cost savings for the State and the addition of a new, favored source of supply will not justify such uneven and unfair treatment. Section 253(a) is violated by the simultaneous granting of an advantage to the Company while unnecessarily excluding other entities from use of these valuable direct freeway routes.

5. The Exclusive Freeway Use Provision will violate Section 253(a) by preventing a fair and balanced regulatory and legal environment.

The Commission recognized in Huntington Park that Section 253(a) is violated if one competitor is granted a legal or regulatory preference by a State or local entity, saying in part:

> The more difficult issue is whether, under section 253(a), the Ordinance "has the effect of prohibiting," the ability of any entity to provide payphone service . . . In making this determination, we consider whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

(Emphasis added). Id. at ¶ 31. The Commission recently confirmed this criteria in Troy.[47]

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[45] Id. at attached table.

[46] Id. at ¶ 12.

[47] The Commission said:

The Commission has also recognized that requirements that significantly hinder one competitor relative to another violate Section 253(a), saying in New England:

> We find that requiring payphone providers to provide local exchange services in order to be eligible to offer payphone services significantly hinders such providers relative to incumbent LECs and certified LECs. Such a requirement substantially raises the costs and other burdens of providing payphone services, thus deterring the entry of potential competitors.

(Emphasis added) At ¶ 20. Discriminatory regulation is inherently suspect, as the Commission had noted.[48]

Allowing only one provider to enjoy Exclusive Freeway Use Provision over 1,000 miles of valuable right-of way that provide virtually "straight line" access between population centers in Minnesota is clearly neither fair nor balanced regulation.

F. The Asserted Benefits of An Additional Source of Fiber Optic Capacity Will Not Prevent The Exclusive Use From Violating Section 253(a).

The State argues that competition will not be adversely affected, and that it may even be enhanced because the Agreement will result in another source of fiber optic capacity. (St. Pet. pp. 2-3, 25, 26.) This argument is based on the mistaken legal premise that a State may justify impeding competition for one service by an asserted competitive enhancement for another service. Nor is it apparent how competition is enhanced by allowing exclusive access to the best right of way to a single provider as compared to offering these cost advantages to all providers.

> In evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, we consider whether it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." (citing Huntington Park)

12 FCC Rcd. at 21439¶ 98.

[48] In Troy the Commission noted:

> An especially troubling issue alluded to in the record concerned the discriminatory application of telecommunications regulation, whether at the State or local level. At ¶ 107.

Further, it is far from clear that the impacts of the will be as the State asserts throughout the 10 to 20 year duration of the Exclusive Freeway Use Provision.

1. Section 253(a) Does Not Allow States To Selectively Inhibit Competition For One Service To Promote Competition For Another Service.

There is no indication that Section 253(a) allows States to justify limitations on some telecommunications markets and some service providers by the asserted advantage of encouraging another provider. To the contrary, the Commission has found that Section 253(a) was intended to protect all providers for all services.[49] Manipulation of market forces and selective promotion and inhibition of various markets by a State are directly at odds with the philosophy and goal of the 1996 Act to reduce regulation and encourage competition in all markets by all providers.[50] The 1996 Act does not intend that States grant favors to some competitors while withholding favors from other potential competitors. To the contrary, the Commission has found that additional layers of regulation that are intended to regulate relations between competitors are subject to "strict scrutiny" since the probable effect will be to impede, not promote, competition.

In Troy, the Commission stated its concerns regarding additional layers of regulation. While the entity involved in Troy was a municipality, the rationale stated by the Commission is

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[49] As the Commission has noted in Classic:

> As explained in the Local Competition First Report and Order, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced communication in all telecommunications, by allowing all providers to enter all markets."

(Emphasis original in Classic) 11 FCC Rcd 13095.

[50] As the Commission also noted in Classic:

> Congress intended primarily for competitive markets to determine what entrants shall provide the telecommunications services demanded by consumers . . . 11 FCC Rcd at 13895.

no less applicable in this case, since neither MnDOT nor the Department of Administration have any established role in the regulation of telecommunications under either Minnesota or federal law. In Troy, the Commission said in part:

> Our concern is that some localities appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant "third tier" of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public. For example, the Troy Telecommunications Ordinance contains provisions that, among other things, require franchisees to interconnect with other telecommunications systems in the City for the purpose of facilitating universal service, provide for regulation of the fees charged for interconnection, and mandate "most favored nation" treatment for the City .... Such Ordinance provisions will be difficult to justify under section 253(c) on the grounds that they are within the scope of permissible local rights – of-way management authority .... Given the likelihood of such local requirements impeding competition and imposing unnecessary delays on new entrants, attempts to impose redundant "third tier" of regulation at the local level will be met with close scrutiny by the Commission.

At ¶ 105. While the limitations imposed on the Company by the MnDOT and Department of Administration may have been well intended and based on the belief that their efforts are procompetitive, the Act does not contemplate another level of regulation and governmental manipulation of the telecommunications market, particularly where there are clear adverse impacts on many entities and many markets for telecommunications services.

2. Any Current Increase In Capacity Will Be Achieved At The Cost Of Long Run Competitive Barriers For Other Entities.

There are also fundamental factual defects in the State's argument that the overall effect of the Agreement is pro-competitive.

First, the State's argument that the overall competitive effect is positive rests on a comparison of costs and benefits. The asserted benefit is that a new source of fiber optic capacity will be introduced, which will occur in the short run. The State's argument rests on the implicit assumption that this benefit will be achieved without any short run detriments to competition. There are serious questions whether even the short run impact will be positive.

The State has clearly indicated that it plans to use the free capacity that it receives from the Company for the State's network ("MNet").[51] MNet is the state operated telecommunications network which has authority to provided service not only to the State and its political subdivisions, but also to public, religious and private schools, private colleges and to "public corporations."[52] Currently, the State purchases the capacity that it needs for MNet from private sector providers. Those private sector providers also offer service to the same entities to which the State offers service through MNet. Obtaining free capacity from the Company will clearly provide to the State a significant cost advantage in operating MNet, which will enhance ability of MNet to compete with the private sector. Eliminating the ability of the private sector to use the freeway rights-of-way will provide an added competitive advantage to the State network.

In many rural areas, governmental and educational customers are among the most significant customers for high capacity providers. To the extent that the State captures more governmental and private and public school traffic by the cost advantages of its free capacity obtained form the Company, the viability of other commercial fiber optic facilities will be reduced and the construction of new networks will be discouraged. Removing this traffic from

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[51] Agreement, **Section 3.4:**

> State shall have the unfettered right to use or make available use of the Network for, and only for (a) communications by, from , to , between or among any of the <u>agencies and entities which are eligible to participate in MNet</u> under applicable Laws and Regulations, including but not limited to those agencies and entities described in the definition of MNet and (b) <u>communication services for MnDOT and its Intelligent Transportation Systems.</u> Except for uses permitted under <u>subsections (a) and (b)</u> above, in no event shall State use or make available use of the Network for commercial purposes.

[52] See, Minn. Stat. § 16B.465. "Public corporations" (referred to in Minn. Stat. § 16B.465) include entities such as the Metropolitan Council, the Metropolitan Airports Commission, Local Transit Commissions, the World Trade Center Corporation, Waste Management Districts, and other entities.

existing rural networks may eliminate the critical mass needed to support state of the art facilities and network capacity. Granting Exclusive Freeway Use Provision to enable the State to obtain such cost advantages over private, competing networks seems particularly inconsistent with Section 253(a).

Second, the State's assertion of competitive benefit without adverse competitive consequences rests on the implicit assumption that the economic significance of exclusive use of the freeways will not increase in unpredictable ways during the 10 to 20 year duration of the Exclusive Freeway Use Provision. This in turn rests on the dubious premise that the current economic and technical characteristics of telecommunications transport market will remain unchanged for the next 10 to 20 years.

History demonstrates the unreliability of such an assumption. The changes in technology over the past 10 to 20 years have revolutionized the industry. These include changes from mechanical to digital switching, from twisted copper to microwave, satellite and fiber optic transmission, and from IMTS radio to analog cellular and now digital wireless communications. There is no indication that change will slow in the future or that the State is unaware of the probability of change.[53] Yet, the State requests that the Commission declare that whatever those the competitive impacts for the next 10 to 20 years, the Exclusive Freeway Use Provision is legal under the 1996 Act and will remain so. Clearly, the inability to predict so far into the future is sufficient in and of itself to deny the Request for Declaratory Ruling.

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[53] See, Exhibit 5 attached, AASHTO, Guidance on Sharing Freeway and Highway Rights-of -Way for Telecommunications,("1996 AASHTO Guideline") p. 30 which reads in part:

> "The market for communications is dynamic and communications for transportation - particularly ITS - is even less predictable. <u>Communications needs in both the private market and public sector will most certainly change over the term of the shared resource project</u>. It is thus important, in the event of future expansion of the communications infrastructure, the public and private partners designate and agree upon the specific roles and responsibilities for each." (Emphasis added).

E. None Of The Contract Terms Intended To Limit The Competitive Advantage Of The Company Are Adequate To Prevent A Violation Of Section 253(a).

The State asserts that one or more of the provisions that it includes to limit the advantage of the Company will prevent a violation of Section 253(a). To the contrary, none of those provisions is adequate to prevent a violation.

1. The provisions for limited collocation do not prevent a violation of Section 253(a).

The State relies on the Company's obligation to collocate other carriers' facilities. (St. Pet. pp. 9-10.) However, that obligation is limited to installations requested at the same time that the Company chooses to install its facilities.[54] These very limited opportunities for competitors do not prevent a violation of Section 253(a) for several reasons. The limited opportunities for and the Commission's policy of retaining supervision under Section 253(a).

First, collocation will have literally no value to a new entity that may be formed in 5, 10 or 15 years or to an existing entity whose need arise in those time periods, since the construction will have long been completed by that time. Those entities are no less entitled to the protection of Section 253(a) than existing entities. As a result, the high probability of a future violation of Section 253(a) precludes the grant of the Declaratory Ruling that the State requests.[55] The ability

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[54]Agreement, Section 5.12

[55] Although the Commission found no controversy in Troy (based on TCI's plans) the Commission said:

> We caution that our resolution of issues under Title VI should not be construed in any manner as prejudging how the Commission would rule on a well-founded Section 253 challenge to the Troy Telecommunications Ordinance itself, or to any similar ordinance."

At ¶ 102. Similarly, in Huntington Park the Commission express reserved the ability to review the impact on a future petitioner, saying part:

> If we are presented in the future with additional record evidence indicating that the City is exercising its contracting authority in a manner that arguably "prohibits or has the effect of prohibiting" the ability of payphone service providers other than Pacific Bell to install payphones

of those entities to use their own facilities in the freeway rights-of way will be entirely prohibited by the Exclusive Freeway use.

Second, the pricing protections set forth for collocation are inadequate to protect any collocating entities from discrimination by the Company in favor of its affiliates which also have the right to request collocation.[56] The pricing protections are inadequate because Agreement provides for no adequate mechanisms for enforcement, particularly in the time frames involved in construction scheduling.[57]

Third, requiring an entity to match its construction activities to a competitor (the Company) is a further significant disadvantage because business plans may not develop simultaneously relative to another. The Commission has found that imposing added costs or other significant disadvantages on one entity constitutes a violation of Section 253(a).[58]

Fourth, installing a competitors facilities will provide the Company with competitively sensitive information about the competitor's transport capacity.

For all of these reasons, the collocation provisions of the Agreement do not prevent violation of Section 253(a).

> outdoors on the public rights-of-way in the Central Business District, we will revisit the issue at that time.

(Emphasis added) At ¶ 38.

[56] See, Agreement, Section 7.8.

[57] See, Agreement, Section 7.7 (a)-(d).

[58] See, New England ¶ 20; Huntington Park ¶ 31; Troy ¶ 98; PUC of Texas ¶¶ 13, 78.

2. Terms requiring the Company to allow use of its facilities at non-discriminatory prices will not prevent violation of Section 253(a).

The State also relies on the terms of the Agreement restricting the Company's ability to price discriminate in leasing its facilities. (St. Pet. pp 11, 25-26.) There are several defects that render these terms inadequate to prevent violation of Section 253(a).

First, imposing a requirement for nondiscriminatory access and pricing does not justify granting exclusive use of rights-of way, including the Exclusive Freeway Use, to a single entity. If imposing a requirement of nondiscriminatory access and pricing satisfied Section 253(a), there would be no obstacle to granting an exclusive franchise use of local rights-of way or to provide for local or other telecommunications services, since nondiscrimination is a historic obligation of common carriers under both State and Federal law. Under the State's argument, Bogue and Hill City would have been able to grant the exclusive franchises that they intended without violation of Section 253(a), contrary to the holding of Classic because the exclusive franchisee would have been subject to requirements of nondiscrimination and mandatory resale.

Second, a review of the Agreement shows that the terms concerning nondiscrimination are ineffective in fact. The Agreement: 1) imposes no significant restrictions on changes in rates; 2) allows different rates for different customers to reflect "reasonable commercial distinctions;" and 3) lacks any mechanisms for enforcement.[59] For instance, there seem to be no

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[59] Agreement, Section 7.7 Rate Structures and Publication.

> (a) At all times throughout the Term, Company shall maintain, offer, accept, implement and adhere to written, uniform and non-discriminatory rates and charges for all similarly situated customers and potential customers for such customer' s rights to use or access the Network or to become Collocating Customers. Company from time to time may modify, supplement or revise its rates and charges for use of or access to the Network, so long as such rates and charges, as modified, supplemented or revised, continue to provide uniform and non- discriminatory rates and charges for use of or access to the Network or for collocating fiber optic cable for similarly

limitations on the Company's ability to raise its prices to exploit the added value of remaining capacity as the supply of available capacity diminishes. Of course, if other providers were not prevented from use of the freeways, there would be no scarcity to exploit. The inadequacy of these pricing provisions is underscored by the "most favored customer" pricing protection reserved for the State[60]. Such added protection for the State would seem to be unnecessary if the non-discrimination provisions were effective for all customers.

For these reasons, the nondiscriminatory pricing terms of the Agreement do not prevent a violation of Section 253(a).

III. THE EXCLUSIVE FREEWAY USE DOES NOT MEET THE REQUIREMENTS OF NECESSITY, NONDISCRIMINATION AND COMPETITIVE NEUTRALITY OF SECTION 253(b).

A prohibition that violates Section 253(a) may be preserved if it meets the requirements of Subsections 253(b) or (c). However, a review of the Exclusive Freeway Use Provision shows that is does not meet the requirements of either Subsection 253(b) or (c). Section 253(b) reads in part:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis ...requirements necessary to preserve and advance universal service, protect the public safety and welfare , ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

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situated customers and potential customers. <u>The term 'similarly situated customers and potential customers" is intended to permit</u> Company to maintain, offer, accept, implement and adhere to <u>different rates and charges for different classifications of customers (including but not limited to Collocating Customers) based on commercially reasonable considerations and distinctions, such as</u> but not limited to the <u>volume of capacity</u> in the Network utilized or the <u>volume of data transported</u> by a particular customer <u>or the length of time for which any particular customer commits</u> to the utilization of a specified volume of capacity in the Network or a specified volume of data transported. (Emphasis added).

[60] See, Agreement Section 5.12 (d).

The Exclusive Freeway Use Provision fails to meet these requirements for two reasons. First, it is not necessary to "protect the public safety and welfare" or to meet any other permitted goal of Section 253(b). Second, it is not competitively neutral.

A. Neither Cost Saving nor Administrative Convenience Can Justify Violation of Section 253(a).

Section 253(b) requires that a prohibition be "necessary" to meet the legitimate objectives set forth in that Section. Those objective include: 1) preservation and advancement of universal service; 2) protection of public safety and welfare; 3) ensuring continued quality of service; and 4) safeguarding the rights of consumers of universal service. Neither achievement of cost savings for the State nor administrative convenience are objectives that allow violation of section 253(a) and are not "necessary."

The State asserts that the Agreement, including the Exclusive Freeway Use Provision, will further four policy goals, two of which relate to reduction of the State's costs of telecommunications. (St. Pet. pp. 4, 9). There is no question that these cost savings will be obtained by "bartering" the Exclusive Freeway Use Provision for free transmission capacity. (St. Pet. p.9.) However, Section 253(b) does not include achievement of cost savings for a State among public purposes that will justify a prohibition of competition. If such cost savings provided a justification for imposing competitive barriers, there would be virtually no limit on the barriers that could be imposed. In addition, as previously discussed, the Agreement allows the State to use the free capacity that it will obtain to provide telecommunications service through MNet.

As a result, the cost saving experienced by the State will also enable the State to compete with private sector entities for the business of not only political subdivisions of the State, but also the business of private and public schools, private universities, "public corporations." In this context, the rationale of cost saving for the State seems particularly deficient. Accordingly, the benefit of cost savings to the State do not provide any support to the State under Section 253(b).

B. To Be Necessary Within the Meaning of Section 253(b), A Requirement Must Be More Than Merely Reasonable or Efficient for The State.

The State also asserts that exclusive access for fiber optic installation is necessary for "optimum management" and the "efficient development, maintenance and relocation of freeways." (St. Pet p. 8) The Commission has recognized that in addition to advancing one of the public interest goals listed in Section 253(b), a legal requirement must also be "necessary," saying:

> Permissible state and local requirements under § 253(b) must also be necessary to achieve the public interest purposes listed in that section."

PUC of Texas ¶ 83. The Commission the also explained that the term "necessary" as used in Section 253(b) does not have the same meaning as in Section 251 (where only a showing of usefulness is required.) the Commission said in part:

> In the case of section 253(b), interpreting the word "necessary" in the same manner as in section 251 ... could well thwart the procompetitive intent of section 253. This approach would allow states and local governments overly broad discretion to adopt policies or regulations that "prohibit or have the effect of prohibiting" entry in local telecommunications markets with only a minimal link between the challenged regulation and the purported public interest. Such a result could enable the exception contained in section 253(b) to undermine the general rule set forth in section 253(a).

Id. At ¶ 87. The Commission applied the same standard in dealing with public safety and consumer protection in New England, saying:

> As an independent basis for our decision that the DPUC Decision fails to satisfy section 253(b), we conclude that the DPUC has not demonstrated that its prohibition is "necessary" to " safeguard the rights of consumers" or to "protect the public safety or welfare." As an initial matter, we reject the DPUC's claim

> that its prohibition is defensible because it is a "reasonable exercise of its explicitly reserved authority." An interpretation of section 253(b) that a state's action merely be reasonable ignores the specific language of the statute requiring such state action to be "necessary." Moreover, accepting the DPUC's claim would, in effect, require us to employ a relaxed interpretation of the term "necessary" that is inconsistent with Congress's purpose of removing regulatory barriers to entry in the provision of telecommunications services.

(Emphasis added). At ¶ 21. New England also clearly indicates that a prohibitive legal requirement is not "necessary" if there are other less restrictive methods available, even in the context of restrictions intended to serve public safety. The Commission said:

> The DPUC has chosen the most restrictive means available in its efforts to protect payphone customers -- a flat prohibition against non-LECs providing payphone services within the state. The record, however, does not support a finding that such an extreme approach is "necessary" to protect payphone customers. The DPUC has not demonstrated that other methods short of a flat prohibition are insufficient to protect payphone customers.

(Emphasis added) Id. at ¶ 22.

The State argues that any determination relating to safety should be accepted if it is "reasonable" and should not be subject to the test of whether there is a less restrictive means to accomplish that result.[61] The State's position that decisions regarding freeway right of way management are virtually beyond the Commission's review is even more extreme.[62] The State's position would create an exception, under Section 253(b) that would swallow the rule of Section 253(a).

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[61] The State Petition reads:

> Unlike certain types of economic entry regulation, requirements which clearly are aimed at protecting public safety should be reviewed based on whether the regulation or requirement is reasonable, not whether it is the least restrictive alternative available. (Emphasis added). At pp. 27-28.

[62] The State Petition reads in further part:

> MnDOT determined that working with a single firm, a single point of control and contact to insure limited entry on these rights-of-way, in order to retain sufficient management capabilities over